SUPREME COURT, U.S.
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No. 76-73

In the Supreme Court of the United States

OCTOBER TERM, 1976

STELLA YOUNG and RONNIE J. ENRIGHT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

GEORGE S. KOPF,
RICHARD S. STOLLER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 535 F. 2d 484.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1976. A petition for rehearing was denied on June 18, 1976. The petition for a writ of certiorari was filed on July 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly admitted testimony concerning a seizure of marijuana, a portion of which was destroyed pursuant to agency policy prior to trial.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted of conspiracy to import marijuana and to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 963, and possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Young was also convicted of unlawful importation of approximately 1,033 pounds of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1). Young was sentenced to 3 years' imprisonment on each of the three counts, the sentences to be served concurrently, followed by a two-year special parole term on each count, the parole terms to run consecutively. Enright was sentenced to three years' imprisonment on both counts, the sentences to be served concurrently, followed by consecutive two-year special parole terms on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioners were arrested on August 27, 1974, in possession of a large quantity of marijuana. A federal agent then took custody of the marijuana and placed it in the evidence storage room of a nearby Drug Enforcement Administration office. The total weight of the marijuana was determined to be 1,033 pounds (Tr. 171-173).

The agent then took one kilogram brick from the seized marijuana, as well as core samples from ten other bricks, and mailed them to the DEA Regional Laboratory under registry number 141712 (Tr. 178-179, 190). Other matter seized from a co-conspirator was sent to the laboratory under registry number 171338 (App. A, *infra*),[1] and, at

[1]The affidavit of Kenneth J. Sul, Special Agent, Drug Enforcement Administration, which was made part of the record in the court of appeals, is reproduced herein as Appendix A.

trial, the agent inadvertently testified that the seized marijuana had been sent under that registry number (App. A, *infra*). A DEA chemist testified that the brick and core samples were analyzed and contained marijuana (Tr. 285). Pursuant to the DEA policy applicable at that time, the seized marijuana, other than 1,038 grams retained for analysis and evidence, was destroyed on October 2, 1974 (Tr. 179-184, 218).

ARGUMENT

Petitioners' principal contention (Pet. 11-18) is that the trial court improperly admitted evidence concerning the 1,033 pounds of marijuana that had been seized, because all but about two pounds of it was destroyed by the Drug Enforcement Administration prior to trial. The court of appeals correctly rejected this contention in an opinion on which we largely rely.

The loss or destruction of evidence, not resulting from actions taken in bad faith, has consistently been held harmless in the absence of prejudice to the defendant. *E.g.*, *United States* v. *Love*, 482 F. 2d 213 (C.A. 5); *United States* v. *Shafer*, 445 F. 2d 579, 581-582 (C.A. 7), certiorari denied, 404 U.S. 986; *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S. 916; *United States* v. *Bryant*, 448 F. 2d 1182 (C.A. D.C.); see, also, *United States* v. *Augenblick*, 393 U.S. 348.[2] In the present case, the court of appeals stated (Pet. App. xv-xvi):

[2]The cases cited by petitioners (Pet. 13) to show a conflict in the circuits (*United States* v. *Miranda*, 526 F. 2d 1319 (C.A. 2), certiorari denied, October 4, 1976, No. 75-1590; *United States* v. *Bryant*, 439 F. 2d 642 (C.A. D.C.); *Ross* v. *State of Texas*, 474 F. 2d 1150 (C.A. 5), certiorari denied, 414 U.S. 850) do not stand for a different rule. Those cases merely acknowledge that intentional, bad faith destruction of evidence by the government or negligent suppression causing significant prejudice to the defendant may result in judicial sanctions. As we discuss in the text, the evidence here was not destroyed in bad faith, and petitioners suffered no prejudice.

> There is nothing in the record to indicate that the destruction of the bulk of the seized marijuana was done in bad faith. We also fail to see how either of the appellants was prejudiced by the failure of the Government to produce the full seizure. Photographs were made of the seizure and samples were taken and preserved through the trial. The jury was properly instructed that it could infer the appellants intended to distribute the marijuana if it found that a large quantity was involved. It was also instructed that it alone was to determine whether the entire seizure was, in fact, marijuana. The jury found against appellants on these questions and we cannot say that the evidence and testimony did not support those findings.

Although petitioners imply that any intentional destruction of evidence automatically demonstrates bad faith, the testimony at trial established that the destruction of large quantities of narcotics was a policy of the Drug Enforcement Administration at that time. Nor do petitioners point to any prejudice to their defense caused by this policy. Indeed, introduction of the entire seizure into evidence would not only have been extremely cumbersome but likely would have served only to emphasize petitioners' culpability.[3] In any event, the weight of the seized marijuana was relevant only as proof of an intent to distribute; it was not necessary to introduce any physical evidence of the marijuana itself at trial. *United States* v. *Irion,* 482 F. 2d 1240 (C.A. 9).[4]

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[3]This case does not involve the deliberate nondisclosure or suppression of evidence material to presentation of an effective defense. Cf. *Brady* v. *Maryland,* 373 U.S. 83.

[4]Petitioners also urge (Pet. 18) that the trial court should have instructed the jury that it could draw adverse inferences from the destruction of the marijuana. This proposed charge was not presented in timely fashion (Tr. 341) and, in any event, was not required in the absence of any evidence that the government had acted in bad faith.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

GEORGE S. KOPP,
RICHARD S. STOLKER,
Attorneys.

NOVEMBER 1976.

APPENDIX A

AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF PIMA) ss.
)

KENNETH J. SUL, being first duly sworn upon his oath, deposes and says:

That he is a Special Agent for the Drug Enforcement Administration in Tucson, Arizona;

That he testified at the trial of United States v. Stella Young and Ronnie J. Enright, CR 75-80-TUC-TFM, on March 20, 1975 at Tucson, Arizona before the Honorable Thomas F. Murphy;

That when asked at the trial by Assistant United States Attorney, Daniel G. Knauss, under what registry number he had mailed a kilo brick and core samples of marihuana to the Dallas, Texas, D.E.A. Laboratory, he responded 171338;

That he read the wrong number;

That this mistake was due to the fact that three (3) suspected controlled substances related to his prosecution were sent to the D.E.A. Laboratory in Dallas, Texas by two (2) different mailings, with two (2) different registry numbers;

That the laboratory analysis for these three (3) suspected controlled substances were contained in three (3) laboratory reports by the chemist and that your affiant read the registry number, 171338, which concerns amphetamines and four (4) marihuana seeds;

That the correct registry number for the brick of suspected marihuana and the core samples is 141712.

Further your affiant sayeth not.

s/ Kenneth J. Sul

KENNETH J. SUL
Special Agent, Drug Enforcement Administration

Subcribed and sworn to before me this 10th day of July, 1975.

s/ Dorothy E. Sainz

Notary Public

My commission expires: